Materials Research Corporation *and* Steve Hochman.[1] Case 2-CA-16385

July 20, 1982

DECISION AND ORDER

On March 10, 1980, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and Respondent filed a response supporting, in relevant part, the Administrative Law Judge's findings and conclusions.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, and response and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The amended complaint alleges, *inter alia*, that Respondent violated Section 8(a)(1) of the Act by conducting investigatory interviews with employee Steve Hochman on March 22, 1979, after having refused his requests to have a coworker present to assist him.[2] In *N.L.R.B.* v. *J. Weingarten, Inc.*,[3] the Supreme Court held that the employer there violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. In the instant case the Administrative Law Judge found that Hochman requested that a coworker accompany him to investigatory interviews which he reasonably believed might result in disciplinary action. However, noting that Respondent's employees were not represented by a statutory bargaining representative, the Administrative Law Judge concluded that the rationale underlying the *Weingarten* doctrine is not applicable to unrepresented employees and, accordingly, he dismissed the allegation. The General Counsel and the Charging Party except, contending that the *Weingarten* right to request the presence of a representative at an investigatory interview flows from the Section 7 right of employees to engage in concerted activity for mutual aid or protection, and does not depend on the presentational status of a particular group of employees. We agree.

The undisputed facts show that at a meeting held on March 21, 1979,[4] employees in Respondent's precious metals department (PMD) were told by a PMD supervisor, Steven Cross, that starting the following day they would be placed on a new work schedule. Under the new arrangement, PMD employees would report to work at 10-minute intervals and leave work on the same basis. Several PMD employees indicated to the PMD manager, Don Bennett, that the new schedule created problems for them and Bennett responded that he could work out their individual problems. After the meeting, several of the PMD employees talked among themselves and expressed annoyance at this abrupt modification of their work hours. One of these employees, Steve Hochman, suggested that they should go to see Respondent's personnel director, but apparently no action resulted from that suggestion.

On the following day the new work schedule went into effect. That morning a group of PMD employees discussed the new schedule and five of them decided that they would go as a group to see Cross and Bennett about the new schedule. At lunchtime, three of these five, Hochman, Cathy Andriac, and Rich Gibson, went to see Cross in his office. Hochman explained that the employees were dissatisfied with the new work schedule and with the way it had been implemented and indicated that the employees wanted to discuss the subject with management at another meeting. Cross responded that there was no group problem, and that he was available to discuss individual problems with any employee. He refused the request for another group meeting. Hochman, Andriac, and Gibson left and went to see Bennett. There, they renewed their request for a group meeting with management to discuss the new schedule arrangement, but Bennett also rejected that request. At one point in the discussion, Bennett interrupted Hochman to tell him that the PMD is not a democracy, that he runs it and that he will deal only with individuals.

Later that afternoon, Hochman observed Cross talking with a number of the PMD employees individually in his office. One of these employees was Andriac. During their discussion, Cross asked Andriac if she had any problems with the new schedule and she said no. Cross then asked how she became involved in the group meeting. Andriac replied that Hochman had told her that other department employees were experiencing problems with

[1] The Administrative Law Judge incorrectly spelled the Charging Party's name "Hockman"; we have made the appropriate correction to the caption.

[2] The complaint also alleged and the Administrative Law Judge found that Respondent violated Sec. 8(a)(1) by interrogating its employees about how and why they met to discuss among themselves changes in their work hours; and by disciplining Hochman because he engaged in activities protected by Sec. 7. No exceptions were filed to these findings.

[3] 420 U.S. 251 (1975). See also *International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO* v. *Quality Manufacturing Co.*, 420 U.S. 276 (1975).

[4] All dates are in 1979 unless otherwise indicated.

the new schedule. During that same afternoon, another PMD employee, Gibson, told Hochman that he and Cross had discussed the effort to organize a group meeting. Not long after that conversation Cross approached Hochman and said that he would like to speak with him in his office but received no answer. Hochman then informed Cross that he was entitled under Federal law to have another worker present at a disciplinary hearing or at an investigative hearing from which discipline could reasonably result. Cross responded that Hochman had no such right in Respondent's plant. After a brief argument on that point, Cross said that he wanted to talk to Hochman about the new work schedule and any problems he might have with it. Cross then informed Hochman that if he would like to discuss this subject further, he (Cross) would be in his office. Cross began walking back to his office and Hochman followed him there. Once in the office they discussed Hochman's schedule problem. Then, Cross asked Hochman why he had organized the group meeting. Cross claimed that other employees had said that Hochman had "confronted" them to participate in the meeting. Cross told Hochman that he had no right to organize a meeting. When Hochman replied that he had that right, they argued briefly over this point. Hochman asked if Cross wanted anything else and when Cross said no, the meeting ended.

Still later that same afternoon, Cross again told Hochman that he wanted to talk with him. When Hochman arrived at Cross' office he was informed that "this is a disciplinary hearing." Hochman got up to leave, saying that he did not have to be there for an investigative or disciplinary hearing "without proper representation" and that he was going to get another employee to come in with him. Cross responded that Hochman was not permitted to do this and ordered him to sit down. Hochman complied. Cross then gave Hochman a "verbal warning for failure to follow the company grievance procedure and for organizing that group meeting." Cross claimed that Hochman had used production time to organize the meeting. The two men proceeded to discuss and argue about Hochman's discipline and near the close of their discussion Cross placed a typewritten memo of verbal warning in Hochman's personnel file.[5]

Section 7 of the Act protects the right of the employees to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. In its seminal *Weingarten* decision, the Supreme Court emphasized that the statutory protection afforded to an employee's request for the assistance of a union representative at an interview which the employee reasonably believes may result in discipline emanates from the employee rights guaranteed by Section 7. In the words of the Court, an employee's request for assistance falls "within the literal wording of [Section] 7 that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.'"[6] Furthermore, in holding that an employee's request for assistance constitutes concerted action for mutual aid or protection, the Court noted that although only the employee making the request has an immediate stake in the outcome of the interview, the presence of a representative serves a broader purpose with implications beyond the requesting employee's immediate concern. Thus, the representative not only safeguards that particular employee's interest but also the interest of other employees by guarding against unjust or arbitrary employer action; and, in addition, by providing assurance to the other employees that, when and if they are subjected to a like interview, they too can obtain the assistance of a representative. Thus, concerted activity for mutual aid or protection was found to be present in *Weingarten* on the same basis as in *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Co.*:[7]

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each

[5] Hochman was subjected to two interviews on March 22. The Administrative Law Judge found that prior to the initial interview Hochman reasonably feared that discipline might result therefrom. We agree with that finding. We also agree with the Administrative Law Judge's rejection of Respondent's contention that the second interview involved only the imposition of predetermined discipline. See *Baton Rouge Water Works Company*, 246 NLRB 995 (1979) (then Chairman Fanning and former Member Penello dissenting). As the Administrative Law Judge noted, during the second interview Respondent elicited information which provided further basis for the discipline meted out to Hochman beyond that contemplated at the outset of that session. We thus conclude that all prerequisites for the application of the *Weingarten* right have been satisfied here. *Baton Rouge Water Works Company, supra; Texaco, Inc.*, 251 NLRB 633 (1980) (then Chairman Fanning and former Member Penello concurring; former Member Truesdale dissenting in part). For the reasons set forth in his dissenting opinion in *Baton Rouge*, Member Fanning would find that Hochman's right to a representative at the second interview does not depend on whether or not that session was held merely to mete out previously determined discipline. Moreover, the record adequately supports a finding that the second interview was merely a resumption of the first, as found by the Administrative Law Judge. Therefore, Hochman's right to be accompanied by another employee carried over to the second segment of the "interview."

[6] *Weingarten, supra* at 260, quoting from *Mobil Oil Corp.* v. *N.L.R.B.*, 482 F.2d 842, 847 (7th Cir. 1973).

[7] 130 F.2d 503, 505-506 (2d Cir. 1942), quoted with approval in *Houston Insulation Contractors Association* v. *N.L.R.B.*, 386 U.S. 664, 668-669 (1977).

> of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.[8]

The decision in *Weingarten*, of course, is framed in terms of the right to the assistance of a "union representative" at an investigatory interview. That terminology, however, was utilized because it accurately depicted the specific fact pattern presented, i.e., an employee in an organized facility requesting the assistance of her union steward, and not because the Court intended to limit the right recognized in *Weingarten* only to unionized employees. This is readily apparent from the *Weingarten* decision itself. The Court emphasized that the right to representation is derived from the Section 7 protection afforded to concerted activity for mutual aid or protection, not from a union's right pursuant to Section 9 to act as an employee's exclusive representative for the purpose of collective bargaining. Thus, the Court found that that is invoked *only* if the employee requests assistance.[9] For, it is the employee's request for such assistance that constitutes concerted action for mutual aid or protection, activating the Act's protections and requiring the employer either to respect the employee's choice or to forego the interview completely. The Court underlined this point in terms of the interest that an employer transgresses if it denies a request for assistance and compels the employee to appear unassisted at an investigatory interview.

> Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection against possible adverse employer action.[10]

Moreover, the Court carefully differentiated the role assigned to a "representative" at an investigatory interview from that of a collective-bargaining representative acting in its representative capacity. Indeed, the term "representative" in this context is quite limited in that the role is described as acting as an assistant present "to assist the employee, and . . . to clarify the facts or suggest other employees who may have knowledge of them."[11] In addition, the Court made it clear that the employer is free to carry on its inquiry without interviewing the employee who requests assistance, thereby leaving the employee the choice of attending the interview unaccompanied, or having no interview and foregoing any benefits that might be derived from one. Finally, to dispel any possible remaining doubt about the matter, the Court stressed that the employer has no obligation to bargain with any such "representative" who may be permitted to attend an investigatory interview.[12]

It is by now axiomatic that, with only very limited exceptions,[13] the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union, or whether the conduct involved is related, directly or indirectly, to union activity or collective bargaining. Perhaps the most frequently cited case acknowledging this principle is *N.L.R.B.* v. *Washington Aluminum Company, Inc.*,[14] where the Supreme Court extended the protection of Section 7 to unorganized employees who walked off the job to protest the lack of adequate heat in their plant. In addition, the principle has been recognized by the Board[15] and the courts[16] on innumerable occasions.

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[7] *Weingarten, supra* at 261.

[8] Were the *Weingarten* right viewed as a function of a union's status as collective-bargaining representative, it would follow that the right could also be invoked by the union, independent of employee desire.

Member Jenkins agrees fully with his colleagues that an employee's *Weingarten* rights may not be activated contrary to the employee's desire. However, Member Jenkins finds that an employee's *Weingarten* rights properly are asserted where an employee accepts his union representative's request to assist the employee. See *Climax Molybdenum Company, a Division of Amax, Inc.*, 227 NLRB 1189 (1977).

[9] Quoting from *Mobil Oil Corporation*, 196 NLRB 1052 (1972).

[10] *Weingarten*, 420 U.S. at 260. See *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980), enforcement denied on the facts 667 F.2d 470 (5th Cir. 1982), and *Texaco, Inc.*, 251 NLRB 633 (1980), enfd. 659 F.2d 184 (9th Cir. 1981), for a discussion of the role of a "representative" at an investigatory interview.

[11] 420 U.S. at 259.

[12] See *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

[13] 370 U.S. 9 (1962). We perceive no basis for the assertion by dissenting Chairman Van de Water that Congress has declared that the means by which employees are to redress the economic imbalance between employers and employees "is utilization of the Act's processes for majority selection of an exclusive collective-bargaining representative."

[14] See *Red Ball Motor Freight, Inc.*, 253 NLRB 871 (1980) (employee complaint about order of recalling employees and requirement that employees use vacation time during forced layoff protected); *Go-Lightly Footwear, Inc.*, 251 NLRB 42 (1980) (walkout by employees in support of discharged employee, and picketing with placards referring to unkept employer promises, scab labor, and unfairness to minorities protected); *Savin Business Machine Corporation*, 243 NLRB 92 (1979) (discussions among employees about loss of commissions on rental renewals protected); *Steere Dairy, Inc.*, 237 NLRB 1350 (1978) (employee attempt to convince other employees to join in walkout to protest pay rate change protected); *Hansen Chevrolet*, 237 NLRB 584 (1978) (employee inquiry about wage system protected); *American Arbitration Association, Inc.*, 233 NLRB 71 (1979) (employee assistance to other employees in resisting dress code protected); *Fairmont Hotel Company*, 230 NLRB 874 (1977) (employees' inquiries and complaints about tip policy protected); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975) (employee filing complaint with OSHA about working conditions protected); and *Carbet Corporation*, 191 NLRB 892 (1971) (employee acting as spokesman for employee concerning grievances prior to onset of organization driver protected).

[15] See *Vic Tanny International, Inc.* v. *N.L.R.B.*, 622 F.2d 237 (6th Cir. 1980) (employee walkout to protest unfair job assignments protected); *N.L.R.B.* v. *Empire Gas, Inc.*, 566 F.2d 681 (10th Cir. 1977) (individual employee's action soliciting support for collective refusal to work protected); *United Merchants and Manufacturers, Inc.* v. *N.L.R.B.*, 554 F.2d

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Moreover, although the precise issue of whether the *Weingarten* right applies to unrepresented employees has not previously been decided by the Board, in a number of cases presenting related issues the Board has considered the scope of the *Weingarten* right and has indicated that it applies to organized and unorganized employees alike. The first such instance was in *Glomac Plastics, Inc.*,[17] where we concluded that:

> Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation. The Court's *Weingarten* and *Quality* decisions are clearly grounded on Section 7 of the Act which guarantees employees' rights and guarantees, in particular the right of employees "to engage in . . . concerted activities for mutual aid or protection." We do not believe the Court's decisions command us to interpret Section 7 in a manner which is clearly restrictive of its broad scope or does violence to its purposes.

We further noted in *Glomac* that this conclusion was buttressed by the analysis set forth in the *Weingarten* dissent filed by Justices Powell and Stewart:

> While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9 (1962).[18]

The Board has continued to adhere to this view in subsequent cases[19] and, to date, those courts of appeals that have had the opportunity to comment upon the matter agree with this interpretation of the *Weingarten* right.[20]

In this regard, Chairman Van de Water's assertion in his dissent that the right involved in *Weingarten* is the "right to be free from employer interference which deprives employees of the representation of their duly *chosen agent*" reflects a misreading of the development of the Board's interpretation of Section 7 as affirmed by the Supreme Court. In *Texaco, Inc., Houston Producing Division*, 168 NLRB 361 (1967), the pre-*Weingarten* case on which the Chairman relies, the Trial Examiner dismissed a complaint alleging the employer had violated Section 8(a)(1) and (5) by refusing to allow a union representative to attend a disciplinary meeting with an employee in the bargaining unit who was not a union member. Although the Trial Examiner found the contract grievance procedure controlling, the Board held that, as discipline affected terms and conditions of employment, the refusal of the request violated that Section 7 right to be represented by one's collective-bargaining representative in such matters. The Board went on to find that, in view of the employee's request for union representation and the union's evident willingness to represent him, the employer's refusal "transgressed its obligation to bargain with the Union concerning the terms and conditions of employment of the employees it represents." In subsequent cases—see, for example, *Dayton Typographic Service, Inc.*, 176 NLRB 357 (1969)—the Board refused to apply the rationale of *Texaco* to investigatory interviews. The Board viewed such "fact finding" interviews as involving only a potential for action adverse to terms and conditions of employment and, therefore, lacking any matter to which a bargaining obligation attached.

Then, in 1972, in *Quality Manufacturing Company*, 195 NLRB 197, and *Mobil Oil Corporation*, 196 NLRB 1052, the Board extended to investigatory interviews the right to the assistance of a union representative. It did so, however, specifically as a function of the Section 7 right of employees to engage in concerted activity for mutual aid or protection, and *not* as a function of the Section 7 right to bargain through one's representative in the 8(a)(5) context. It was this "new" interpretation of Section 7 in the context of interviews in which only a potential for discipline obtained that the Court affirmed in *Weingarten*. As the Court stated at 265:

> We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutionary approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national

1276 (4th Cir. 1977) (work stoppage by unrepresented employees to protest discharges protected); *United Packinghouse, Food and Allied Workers International Union, AFL-CIO* v. *N.L.R.B.*, 416 F.2d 1126 (D.C. Cir. 1969), cert. denied 396 U.S. 903 (1969) (workers acting to establish racially integrated employment conditions protected); and *N.L.R.B.* v. *Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941 (1st Cir. 1961) (seeking reinstatement of discharged employee protected).

[17] 234 NLRB 1309, 1311 (1978).

[18] *Glomac, supra* at 1311, citing *Weingarten* at 1310.

[19] *Anchortank, Inc.*, 239 NLRB 430 (1978); and *Illinois Bell Telephone Company*, 251 NLRB 932 (1980).

[20] See *Anchortank, Inc.* v. *N.L.R.B.*, 618 F.2d 1153 at 1157–58 (5th Cir. 1980); and *N.L.R.B.* v. *Columbia University*, 541 F.2d 922, 931, fn. 5 (2d Cir. 1976).

> labor law would misconceive the nature of administrative decision making. . . .[21]

Nor is the Chairman's reliance on *Emerson Electric Co., U.S. Electrical Motors Division*, 185 NLRB 346 (1970), appropriate. True, the Board there held that Section 7 did not create a right to "insist, to the point of insubordination, upon having fellow employees present as witnesses to a meeting in a private office at which it is expected that some measure of discipline will be meted out."[22] *Emerson*, however, predated *Quality Manufacturing* and *Mobil Oil* and, to the extent inconsistent therewith, is of no value as precedent. The Chairman's dissent thus seems to advocate a return to the rationale of *Texaco*—the assistance of a *union* representative is guaranteed as a function of Section 8(a)(5) and the concomitant Section 7 rights of employees to bargain through their chosen representatives. But, contrary to *Texaco* and its progeny, and without any attendant rationale, the Chairman would provide for such assistance at *investigatory* interviews. Thus, the Chairman's position indicates either a disagreement with *Weingarten* itself, or a failure to distinguish between the duties and functions of a collective-bargaining representative and the role of a *Weingarten* "representative" whether that individual be a fellow employee or union agent.

Contrary to our dissenting colleagues, we find that the rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a coworker at an investigatory interview. In upholding the Board's construction of Section 7, the Court found that the Board's interpretation effectuates the fundamental purposes of the Act. The Court explained[23] that,

> In § 1 . . . the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." *Ibid.* Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965).

The considerations are present without regard to whether employees are represented by a union. As the Board indicated in *Glomac Plastics, Inc.*,[24] the need of unrepresented employees to support each other through this type of conduct may well be greater than that of represented employees. Unrepresented employees normally do not have the benefit of a collective-bargaining agreement which serves as a check on an employer's ability to act unjustly or arbitrarily. Nor do they usually have the protection of a grievance-arbitration procedure to police the terms of such an agreement. Correcting the relative imbalance between unrepresented employees and their employer is not achieved by forcing an employee to attend a disciplinary interview alone. To counter this imbalance, employees in an unrepresented unit must look to each other for whatever mutual aid or protection they can muster in the face of unjust or arbitrary employer action. Indeed, when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the Act is designed to safeguard. In short, with respect to the *Weingarten* rationale:

> Our own reading of *Weingarten* and *Quality* persuades us that the Court's primary concern was the right of employees to have some measure of protection against unjust employer practices, particularly those that threaten job security. These employee concerns obtain whether or not the employees are represented by a union. . . . [*Glomac Plastics, Inc., supra* at 1311.]

In arguing that the presence of a coworker at an investigatory interview serves no constructive purpose when employees are unrepresented, our dissenting colleagues rely, in part, on the fact that, in an unorganized plant, an employee would not have the benefit of being accompanied by an "experienced union representative," a factor raised by the Supreme Court in *Weingarten*. In *Crown Zellerbach, Inc., Flexible Packaging Division*,[25] the Board considered an employer's contention that *Weingarten* was aimed at providing an employee with an experienced union representative. There the Board concluded that an employee's *Weingarten* rights had been satisfied by the attendance of a coworker who

[21] Thus, contrary to Member Hunter's assertion that the Supreme Court in deciding *Weingarten* did not "intend it to be the 'Pandora's box' that it has become," the Court was aware that labor law evolves and develops.

[22] Member Jenkins, while concurring in the result, did so for different reasons.

[23] *Weingarten, supra* at 261–262.

[24] 234 NLRB at 1311.

[25] 239 NLRB 1124 (1978).

was an employee activist and a candidate for union office. (The union had just been voted in, no contract had been agreed upon, and the union representative was miles away.) Since a purpose underlying *Weingarten* is to prevent an employer from overpowering a lone employee, the presence of a coworker, even if that individual does nothing more than act as a witness, still effectuates that purpose, just as the presence of a union representative.

Our dissenting colleagues' additional reliance on the *Weingarten* Court's statement, that the union representative safeguards "not only the particular employee's interest, but also the interests of the entire bargaining unit," further illustrates their misunderstanding of the nature of the Section 7 right involved—the right of *employees* to act in concert for mutual aid or protection. An employee's request for the assistance of his union representative constitutes concerted activity for mutual aid or protection, whether or not the union representative is a fellow employee. In a represented unit, the union is the embodiment of the concerted activity of all unit employees and, as the Court noted, the representative serves a common interest as well as that of the individual employee. However, a request for the assistance of a fellow employee is also concerted activity—in its most basic and obvious form—since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances "as nobody doubts."

Furthermore, the type of assistance that any individual can provide in the stituation outlined in *Weingarten* is limited and can certainly be performed by a fellow employee. A coworker can assist by eliciting favorable facts and even, perhaps, save the employer production time by helping to get to the bottom of the problem that occasioned the interview. Certainly, that an employee is not part of a represented unit does not alter the real possibility that a single employee, confronted by an employer investigating conduct which may result in discipline, may be too fearful or inarticulate to describe accurately the incident being investigated, or too ignorant to raise extenuating factors, as was noted in *Weingarten*. Indeed, without the benefit of a grievance-arbitration procedure to check unjust or arbitrary conduct, an employee in an unorganized plant may experience even greater apprehension than one in an organized plant and need the moral support of a sympathetic fellow employee. Moreover, a coworker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily.

It is for the employee himself to determine whether the presence of a coworker at an investigatory interview provides some measure of protection. Here, employee Hochman apparently believed it did. We would not substitute our judgment for that of employees who have shown that they believe that the presence of a coworker lends a measure of meaningful protection.

Another concern, expressed by the Administrative Law Judge, relates to the common practice in unorganized plants of holding informal investigatory interviews which sometimes lead to discipline in work areas and his concomitant belief that the application of *Weingarten* rights to unorganized employees might unduly interfere with that process. In *Weingarten*, the Supreme Court accepted the Board's view that the right to a representative would not apply

> . . . to such run-of-the-mill shopfloor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative. [*Weingarten, supra* at 257–258, quoting *Quality Manufacturing Co.*, 195 NLRB 197, 199 (1972).]

This should allay any serious fear that the normal work process may be unduly impaired by the application of the right to unrepresented employees. Nor do we believe that application of the right here could lead to a serious interruption in the production process. There is no reason why an employer of unrepresented employees cannot schedule investigatory interviews in a manner that will not disrupt production—as is the normal practice when employees are represented. In fact, where employees are represented, the union official who accompanies an employee at an investigatory interview is usually a steward employed at that same plant. For that reason, the potential for lost production time appears to be much the same at organized and unorganized facilities. In addition, as mentioned above, in both situations an employer's production may actually benefit from the advantage of having an individual present who may be able to assist in expeditiously resolving the problem.

Finally, it bears repeating that an employer retains broad prerogatives when faced with an employee's request for assistance at an investigatory

interview. There is no obligation to accede to such a request, and an employer is free to carry on its inquiry without interviewing the employee, leaving the employee the choice between having an interview unassisted, or having no interview and foregoing any benefits that might be derived from one. Should the employee choose to refrain from participating in the interview, the employer is then free to act on the basis of information obtained from other sources.

In summary, we conclude that the right enunciated in *Weingarten* applies equally to represented and unrepresented employees. Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by conducting investigatory interviews with Steven Hochman on March 22, 1979, after having refused his request to have a coworker present to assist him. We shall modify the Order and notice accordingly.[26]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Materials Research Corporation, Orangeburg, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 1(c) and 1(d):

"(c) Requiring that employees participate in employer interviews without the assistance of a coworker, where such assistance has been refused by Respondent and where employees have reasonable grounds to believe that the matters to be discussed may result in their being the subject of disciplinary action.

"(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

CHAIRMAN VAN DE WATER, concurring and dissenting:

Contrary to my colleagues, I would affirm the Administrative Law Judge's dismissal of the complaint insofar as it alleges that Respondent's investigatory interview of Hochman violated Section 8(a)(1).[27] For the reasons set forth below, as well as those stated by the Administrative Law Judge, it is my view that an employee's Section 7 right to representation at an interview which he reasonably believes may result in his discipline does not attach unless there is a duly recognized or certified union on the scene.

It is well established that rules concerning an employee's right to representation at an interview with his employer must be "consistent with all of the provisions of our Act"[28] and that "exercise of the right may not interfere with legitimate employer prerogatives."[29] Accordingly, the determination of rights and duties under the Act as a whole requires us to reach an accommodation between legitimate employee and employer rights and privileges.

Whether an employee has a right to representation at an interview with the employer in the absence of a union requires, initially, consideration of the intent and requirements of Section 9(a) of the Act. It is now well established that an employer has no statutory obligation to recognize any individual or group as a representative of its employees on matters concerning terms and conditions of employment unless such a representative has been duly recognized by the employer or certified by this Board. *Linden Lumber Division, Summer & Co.* v. *N.L.R.B.*, 419 U.S. 301 (1974). Also, in the absence of a recognized or certified union, an employer is free to deal with[30] its employees individually. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944).

When, however, a majority of the employees in an appropriate unit has designated a bargaining representative and that representative is recognized

[26] The Administrative Law Judge failed to include the narrow cease-and-desist language, "in any like or related manner," which the Board traditionally provides in a case involving these types of violations. Accordingly, we shall modify the recommended Order and notice.

[27] I join with my colleagues in adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) by interrogating its employees about their group meeting to discuss work schedule changes and by disciplining Hochman for organizing and participating in the meeting.

[28] *Quality Manufacturing Company*, 195 NLRB 197, 198 (1972).

[29] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251, 258 (1975).

[30] The term "dealing with" is used throughout this opinion. The phrase is a term of art that appears in Sec. 2(5) of the Act and was the subject of a definitional analysis by the Supreme Court in *N.L.R.B.* v. *Cabot Carbon Co.*, 360 U.S. 203 (1959). In that case, the Court held that "dealing with" is not synonymous with the term "bargaining with" as the latter term is used in the Act. Instead, "dealing with" constitutes a more fluid and less restrictive relationship between employers and employees. Thus, an entity "deals with" an employer when, on behalf of employees, it engages in discussions with the employer on matters relating to terms and conditions of employment, makes various proposals, and offers suggestions to the employer. 360 U.S. at 213-214. The Court also emphasized that the mere fact that the entity's contribution amounts only to suggestions with ultimate authority to act reposing in the employer does not mean that the entity is not "dealing with" the employer. *Id.* at 214. It is within the foregoing definitional framework that I use the term "dealing with" in characterizing the relationship between an employer and the individual requested by an employee to represent or to be present with the employee at an investigatory interview.

or has been certified by the Board, Section 9(a) of the Act imposes upon the employer an obligation to deal with that union as the exclusive representative of its employees. The scope of its obligation is delineated by Sections 8(a)(5) and 8(d). Section 8(d) requires that the employer "confer [with the union] in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to deal with the employees' exclusive representative on matters within the scope of Section 8(d). Thus, when a duly recognized or certified union is present, an employer is no longer free to deal with its employees individually and, by virtue of the obligations imposed by Sections 9(a), 8(d), and 8(a)(5), the employer is required to deal with its employees collectively through their exclusive representative on matters concerning the employees' terms and conditions of employment.[31]

Until now, cases recognizing an employee's right to representation or to the presence of another person at an interview with his or her employer have arisen in the context of such unionization. The central role played by an established collective-bargaining relationship in determining an employee's right to representation was explicitly recognized by the Board in *Texaco, Inc., Houston Producing Division*, 168 NLRB 361 (1967), where it held:

> . . . it is clear that . . . the Company sought to deal directly with Alaniz concerning matters affecting his terms and conditions of employment. Yet, as noted, the employees in the unit had selected the Union to deal with the Respondent on such matters . . . . Respondent's refusal to respect Alaniz' request that the bargaining representative be permitted to represent him at the meeting interfered with and restrained him in the exercise of his rights guaranteed by Section 7 of the Act. Also . . . the Respondent's refusal to deal with the Union on that occasion transgressed its statutory obligation to bargain with the Union concerning the terms and conditions of employment of the employees it represents. Accordingly, we find that the Respondent by the above conduct violated Section 8(a)(1) and (5) of the Act.[32]

Texaco and its progeny involved consideration of the employees' rights in disciplinary interviews. In later decisions the Board held that employees are entitled to representation at investigatory interviews which they reasonably believe would result in their discipline. See *Quality Manufacturing Co., supra; Mobil Oil Corporation*, 196 NLRB 1052 (1972).[33] In so doing the Board continued to recognize, at least implicitly, an established collective-bargaining relationship, with its concomitant rights and obligations, as being crucial to the scope of the employees' right to representation. In *Quality*, the Board spoke of the employee right as follows:

> [W]e have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action.[34]

The Board recognized in *Quality* and *Mobil* what it had stated specifically in *Texaco*; namely, that the unlawful interference caused by an employer's refusal of a request for a representative is the frustration of an employee's right to be free from being required to deal *individually* with the employer in a situation where the established collective-bargaining relationship mandates a right of employees to require that the employer deal with the employee's selected collective-bargaining representative.

In addition, just as *Quality* and *Mobil* grounded the employee's individual right to representation in the established collective-bargaining relationship and the consequences which flow therefrom, so too do those cases cast the commensurate employer obligation in terms of the rights and obligations arising out of an established collective-bargaining relationship. This is reflected in the Board's recognition of the options available to the employer when confronted with a request for representation. An employer can choose to accede to the employee request for a representative or it can choose to forego the interview and continue its investigation independently, taking whichever action it deems appropriate.[35] It is only when an employer seeks

[31] Of course, pursuant to the proviso to Sec. 9(a) employees can present grievances to their employer even though a union is present; yet even there, the union's presence places limits upon both the aggrieved employee's and the employer's rights.

[32] 168 NLRB at 362. See also *Chevron Oil Company*, 168 NLRB 574 (1967); *Jacobe-Pearson Ford, Inc.*, 172 NLRB 594 (1968); *Lafayette Radio Electronics Corp.*, 194 NLRB 491 (1971), all of which arose in the context of an established collective-bargaining relationship and examined situations in which an employer would or would not be allowed to deal with its employees individually on matters relating to terms and conditions of employment.

[33] It was the *Quality* and *Mobil* decisions that set forth the principles adopted by the Supreme Court in its *Weingarten* decision.

[34] 195 NLRB at 198. Similarly, in *Mobil*, the Board stated: "[I]t is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted . . . ." 196 NLRB at 1052.

[35] As the Board stated, allowing an employer to forego the interview "permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required . . . ." 195 NLRB at 198.

to deal with an employee individually on a matter concerning terms and conditions of employment that its obligation to deal with that employee in a collective manner arises. For when the employer foregoes the interview, it, in effect, selects not to deal with its employees and thus the obligations imposed upon it by the existing collective-bargaining relationship do not attach.[36]

This direct linkage between an established collective-bargaining relationship with its attendant rights and obligations and an employee's right to representation is also reflected in the Supreme Court's *Weingarten* decision where the Court discussed the nature of the employee right as follows:

> The Board's construction [in *Quality* and *Mobil*] plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U.S.C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." . . . Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." . . . Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in the light of the mischief to be corrected and the end to be attained." [420 U.S. at 261-262.][37]

Thus, in *Weingarten*, just as in the cases which provide its historical framework, the existence of an established collective-bargaining relationship and the statutory obligations which arise therefrom were central to the definition and scope of an employee's right to representation.

In the face of the historical development of the right to representation at an investigatory interview set forth above, my colleagues seem content to conclude that the absence of an established collective-bargaining relationship has no effect on the employee rights and employer obligations under consideration. In my opinion, however, it does not necessarily follow the elimination of such a historical decisional factor can take place without impacting upon the underlying premises of the decisions which established the parameters of the right to representation.[38] My colleagues' contrary view requires substantially more justification than I can discern in their decision today.

In addition to the lack of historical and analytical foundation for the majority opinion, I believe

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[36] Although the point should be clear, I wish to emphasize that the employee right under consideration is the right to be free from employer interference which deprives employees of the representation of their *duly chosen agent*. See *John M. Lastocka, trading as Ram Construction Company*, 228 NLRB 769, 775 (1977); *James K. Sterritt, Inc. and Concrete Haulers Inc.*, 215 NLRB 769, 774 (1974), where the Board held that an employer's direct dealing with employees violates Sec. 8(a)(1) because it serves to deprive employees of representation by such a duly chosen agent. Although analysis centers upon Sec. 8(a)(1), a necessary component of the analysis is the presence of a duly recognized or certified collective-bargaining representative. It is this component which calls into play Sec. 8(a)(5) and the various provisions of the Act related thereto. See *Glenlynn, Inc., d/b/a McDonald's Drive-In Restaurant*, 204 NLRB 299, 310 (1973), where the Board held that an employer's direct dealing with employees regarding terms and conditions of employment was not unlawful where a union no longer represented the employees.

[37] My colleagues also rely on this language from the *Weingarten* decision, asserting that the presence of a fellow employee at an investigatory interview serves to enhance employees' economic power *vis-a-vis* their employer. While they may be correct that their decision does improve the employees' position in the balance of power, the simple fact remains that Congress has declared that the means by which employees are to redress such economic imbalance is utilization of the Act's processes for majority selection of an exclusive collective-bargaining representative. No doubt, this Board could construct a myriad of rules which would enhance the position of employees. To do so, however, it would have to ignore the mandate of Congress as well as the Supreme Court's admonition that "the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 310.

[38] The Board decided two cases (prior to *Weingarten*) in which the question of an employee's right to representation arose in a situation where no union was present. In both instances, no violation was found. In *Emerson Electric Co., U. S. Electrical Motors Division*, 185 NLRB 346 (1970), two fellow employees of an employee who was to be subjected to an interview left the shop floor to act as "representatives." The subject employee also insisted on the presence of his fellow employees. The Trial Examiner found that the employee's insistence on the presence of his fellow employees was protected in that it arose from his statutory right to engage in "concerted activities . . . for the purpose of mutual aid or protection." In reversing, a Board majority stated:

> The alleged violation of Section 8(a)(1) depends upon whether the concerted activities protected by Section 7 encompass the conduct of [the employees] described above. We do not think that the ambit of Section 7 reaches quite that far. The statutory right of employees to collectively protest an employer's conduct, to present grievances to him, and to engage in other concerted conduct is far ranging. We cannot say, however, that Section 7 creates a right to insist, to the point of insubordination, upon having fellow employees present as witnesses to a meeting in a private management office at which it is expected that some measure of discipline will be meted out. [185 NLRB at 347.]

In the second case, *United Aircraft Corporation*, 179 NLRB 935 (1969), the Trial Examiner found that "the refusal to supply shop stewards during the 'investigation' in the internal security offices violated the employees' rights as well as the Union's, and thus violated the Act both as to Section 8(a)(1) and (5)." 179 NLRB at 969. Upon review, however, the Board found that at the time of the interviews, the union did not enjoy majority status. The Board then dismissed that portion of the complaint because "the Respondent's obligation to honor employee requests for union stewards was dependent upon the majority status of the Union *and* . . . the majority status of [the union] was not established during the relevant period . . . ." (Emphasis supplied.) 179 NLRB at 938.

my colleagues' ruling constitutes a fundamental alteration of established labor law concepts that ignores the applicability of certain of the Act's interrelated provisions. In this regard, the majority opinion also confers a unique form of representational status upon individual employees and places an employee's right to representation at an investigatory interview in an exalted position in comparison to other employer-employee dealings.

The resulting harm to established principles from application of the majority view is most clearly evidenced by the impact such a proposition has on the operation of Sections 9(a) and 8(d). As noted above, in the absence of a recognized or certified union an employer is free to deal with its employees individually on matters concerning terms and conditions of employment; and, in this situation, it cannot be compelled to recognize any individual, group, or organization as a representative of its employees on such matters. It is only when a duly recognized or certified union is present that an employer is precluded from dealing individually with employees and is obligated to deal with its employees collectively. My colleagues' position would impose upon the employer the obligation to recognize someone in a representative capacity to fulfill an individual's perceived need for a safeguard where not created by the Act's requirement of a demonstrated majority employee desire for such a safeguard.[39]

The grant of representational status to a fellow employee has more repercussions than providing the interviewed employee with a sense of security, which appears to be the majority's primary consideration. For, in setting forth the role of the representative at an investigatory interview, the Supreme Court declared that the representative can make proposals and suggestions to the employer concerning such things as alternative discipline and other possible avenues of investigation, even though the employer retains the right to reject such offers. In addition, this Board has held that the representative must be allowed to play an active role in the discussions inasmuch as the employer cannot require the representative to remain silent during the interview. *Southwestern Bell Telephone Company*, 251 NLRB 612 (1980). Accordingly, the role prescribed for a *Weingarten* representative is strikingly similar to the role of a labor organization in its dealings with an employer. See footnote 30, *supra*. Although I find it unnecessary to determine whether a *Weingarten* representative is necessarily a labor organization within the meaning of Section 2(5),[40] I believe it to be significant that a *Weingarten* representative is vested with sufficient legal authority to support the finding, in appropriate circumstances, of labor organization status.

In short, my colleagues have succeeded in creating a hybrid relationship whose existence is justified solely by Section 7's call for employee mutual aid and protection. It is a relationship of potential cost and limitations for the employer which exists without reference to other applicable provisions of the Act; one that exercises its powers without being subjected, in any way, to the responsibilities imposed upon other entities that exercise such powers; and it is a relationship to which the employer must render deference without being provided the normal safeguards which would otherwise be available. I therefore believe that the majority is in effect amending, rather than giving application to, the National Labor Relations Act.

In this same context, the majority position serves to endow an employee's right to representation with a status not accorded other employer-employee confrontations relating to terms and conditions of employment. For example, in the absence of a union, consider an employer's discussion with an employee about changes in his or her pay scale, about safety matters, about his or her hours or requirements of work, or about other such matters. Clearly, each of these issues relates to the particular employee's terms and conditions of employment and each is a matter that could, in the eye of an employee, have a greater negative impact upon employees individually and as a group than could many disciplinary actions. I am confident that my colleagues would not assert that a nonunionized employer seeking to engage an employee in such a discussion would be required to accede to the employee's request that another person be allowed to accompany the employee or else forego such an interview. Yet, it seems clear to me that just such a requirement is the logical extension of the majority's position and that such a fanciful rule of law would be the direct result of seeking to define and shape employee representational rights without reference to an appropriate majority choice of a union.

[39] As the Supreme Court noted in *Weingarten*, the role of the representative at an interview is to safeguard "not only the particular employee's interest, but also the interests of the entire bargaining unit . . . ." 420 U.S. at 260. In my view, the statutory right to vindicate either of those rights can only be derived from the presence of a recognized or certified union.

[40] It has been established that an individual who "deals with" an employer, see *Cabot Carbon, supra*, fn. 30, can be a labor organization. *The Grand Union Company*, 123 NLRB 1665 (1959), cited with approval in *Legal Services for the Elderly Poor*, 236 NLRB 485 (1978). As the Board held in *Grand Union*, when a group of employees designate an individual to represent them, they, "in effect, create a labor organization which is entitled to the same considerations in attempting to represent them under the Act as is a traditional labor organization." 123 NLRB at 1666.

With my colleagues having advanced a rule of law that ignores the basis for a right to representation and operates contrary to established labor law concepts, one would think that the majority would advance substantial and compelling reasons for their decision. It seems, however, that the sole justification advanced is that the presence of a fellow employee at an investigatory interview accords employees some measure of "mutual aid or protection." I do not believe that these words in our Act can properly be given the intent which the majority position places upon them.

First, in defining the scope of employees' Section 7 rights, it is important to recognize that, just as the extent of an employer's obligation is affected by the presence or absence of a properly demonstrated majority representative, so too is the extent of the employees' Section 7 rights likewise affected. When a union becomes the exclusive representative of a group of employees, such employees are no longer individually free to deal with their employer in as full a manner as they could prior to the arrival of the union. Similarly, a union can waive certain employee rights, such as the concerted right to strike, that employees had prior to the union's presence. Conversely, when a union becomes the established collective-bargaining representative, employees become vested with the right to bargain collectively with the employer and the right to require, upon reaching an agreement, a written and signed collective-bargaining contract. Although such rights exist within the framework of Section 7, the presence of a union is required to make the rights operational. My colleagues' conclusion in the present case that Section 7 rights during an investigatory interview are unaffected by the presence or absence of an established collective-bargaining relationship is not in my judgment consistent with established Section 7 principles related to the presence or absence of a union.[41]

In addition, merely determining that an employee's action is an effort to obtain mutual aid or protection does not provide a sufficient basis for extending protection to employees beyond the specific limitations that are established through other provisions of the Act. A ready example is found in *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50. There a group of employees engaged in picketing in furtherance of their effort to deal directly with the employer on matters concerning racial discrimination, even though the employees were represented by a union. The employer discharged the picketing employees. The Court found that the discharges did not violate Section 8(a)(1) because the employees' actions contravened the exclusive representation relationship established by Section 9(a). Clearly the employees in *Emporium* were seeking mutual aid and protection against racial discrimination, through activity which in the absence of a union would be within the protection of Section 7. The right to that concerted activity had to give way, however, when its exercise contravened the rights and obligations imposed by other provisions of the Act. In short, not all concerted actions for mutual aid and protection are protected by our Act.

In the present case, simply because an employee is making a request for the purpose of securing mutual aid and protection, an employer is not precluded from denying the request and continuing to operate its business in the manner it would choose to abide by in the absence of the request. In my view, when the majority concept is applied in a context that is removed from the clear *Weingarten* situation, its logical infirmities become apparent. For example, in a situation where no union is present, employees could band together and agree to ask their employer to submit all changes in the workplace to a majority vote of the employees. By so doing, the employees plainly would be seeking mutual aid and protection against potentially arbitrary or onerous employer actions. An employer could not discipline employees for making such a request. Yet an employer not otherwise violating the law could not be found in violation of the Act for refusing the request and continuing to effectuate changes in the workplace in the manner it had always utilized, until the employer can be assured that a union has been selected by the Act's established processes.

The same analysis, it seems to me, is applicable in the *Weingarten* context. Thus, employees who request the presence of a fellow employee at an investigatory interview are seeking mutual aid and protection and an employer would violate the Act by punishing an employee for *seeking* that protection. But it does not follow that an employer violates the Act by denying the request and conducting the interview in the manner it would have utilized absent the request. I believe that Section 7 vigilantly protects the right of employees to *seek* mutual aid and protection. But I find nothing in the

[41] Note the application of an analogous situation by the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). There the Court, in the context of Title VII and its relation to collective-bargaining provisions, found a distinction between rights conferred on employees collectively to foster the bargaining process which could be waived by the union, as opposed to individual employment rights that are not subject to diminution or waiver. 415 U.S. at 51. See also 88 Harv. L. Rev. 804, 809 (1975), for a discussion, in the context of the NLRA, of the distinction between rights conferred on employees collectively to foster the process of collective bargaining, and rights in absence of collective bargaining as related to equal employment opportunities.

Act which mandates that an employer must, in all instances, accede to the employees' terms.

In summary, it is my belief that the majority's position can only be sustained by ignoring the historical, analytical, and statutory foundation of an employee's right to representation and the employer's right to deal individually with its employees in the absence of a collective-bargaining relationship. The majority decision creates nonstatutory rights that can be utilized without regard to the Act's careful scheme of checks and balances. I respectfully believe that the majority position allows an otherwise limited Section 7 right "to run wild" beyond congressional intent.

MEMBER HUNTER, concurring and dissenting:

In *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251, the Supreme Court upheld the Board's view that an employee has a Section 7 right to the presence of a union representative at an interview which the employee reasonably fears may result in discipline. In the instant case, a majority of the Board has concluded that the rationale enunciated by the Supreme Court in *Weingarten* applies equally to represented employees, as was the case in *Weingarten*, and unrepresented employees, as is the case here. Thus, in their view, an unrepresented employee, like the Charging Party here, is entitled to the presence of a fellow employee at such an investigatory interview. Since I do not agree with my colleagues' extension of *Weingarten* rights to unrepresented employees, I must dissent from that portion of the decision.[42]

As indicated above, the precise issue now before us was not before the Supreme Court in *Weingarten* since the employee there was part of a unit represented by a union and had sought the assistance of her shop steward at the interview to which she was summoned. In finding that such activity was concerted activity for mutual aid or protection within the meaning of Section 7 of the Act, the Court stated:

> This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, *but also the interests of the entire bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.[43] [Emphasis supplied.]

Thus the holding in *Weingarten* is rather clearly grounded in the Supreme Court's recognition of the unique right and obligation of the collective-bargaining representative in terms of protecting the interests not only of the particular individual or individuals called to an investigative interview, but also of all the members of the unit. Hence, although the employer is under no duty to bargain with the union representative who is in attendance at such an investigatory interview, it is clear that the *Weingarten* right to the presence of a steward or other union official flows from the status of the union as collective-bargaining representative. Obviously, these considerations are not relevant in the context of unrepresented employees and cannot sustain the extension of *Weingarten* rights in that context.

Furthermore, there are practical reasons that argue against extending *Weingarten* to cover situations involving unrepresented employees. For example, in *Weingarten* itself the Court underlined the important role a knowledgeable union representative could play in assisting the employer by eliciting favorable facts and the like. Assuming that observation may have some merit, one doubts that a similar argument can be advanced in the context of unrepresented employees. Indeed, the employer in the nonunion situation is likely to find itself confronted by a "representative" who has few or even an absence of the skills or responsibilities that one would expect from a union steward. It must therefore deal with a person who has no experience in dealing with these situations and who, out of probable friendship for the interviewee, may be involved emotionally in the interview.

Finally, I note that the Board has struggled with an ever increasing number and variety of problems arising from the attempted exercise of *Weingarten* rights in the workplace. I have expressed elsewhere my disapproval of expansionist Board decisions that have interpreted *Weingarten* so as to encourage the transformation of investigatory interviews into a formalized adversary proceeding, a result the Supreme Court clearly wished to avoid.[44] The extension of *Weingarten* rights to unrepresented employees is certain to involve similar problems, only on a much larger scale, and probably additional

[42] I concur in adopting the Administrative Law Judge's findings with regard to the other alleged violations of Sec. 8(a)(1).

[43] *Weingarten, supra* at 260–261.

[44] See my dissent in *Pacific Telephone and Telegraph Company*, 262 NLRB No. 127 (1982), where the Board found that *Weingarten* encompasses a right to prior consultation as well as a right to be informed of the subject matter of the interview.

new problems as well. That is a result to be avoided, particularly since I seriously doubt that the Supreme Court in deciding *Weingarten* ever intended it to be the "Pandora's box" that it has become.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT ask you how or why you came to take part in any meeting you have had with your fellow employees which are concerned with discussing your work schedule or any other terms and conditions of your employment.

WE WILL NOT discipline any of our employees for participating in any such meeting.

WE WILL NOT require any employee to take part in an interview where the employee has reasonable grounds to believe that the matters to be discussed may result in his or her being the subject of disciplinary action and where we have refused to permit him or her to be assisted at such meeting by a coworker.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the verbal warning given to Steve Hochman for his participation in such a meeting and remove from his personnel file any reference to it.

MATERIALS RESEARCH CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: This case was heard in New York, New York, on November 15 and 16, 1979. Upon an unfair labor practice charge filed by an individual, Steve Hockman, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), the complaint herein issued alleging that Materials Research Corporation (herein called Respondent) violated Section 8(a)(1) of the Act.[1] Respondent's answer denied the commission of any unfair labor practices.

The issues to be decided are as follows:

(1) Did Respondent, in violation of Section 8(a)(1), interrogate its employees as to how and why they met to discuss among themselves changes in their work hours?

(2) Did Respondent, in violation of Section 8(a)(1), discipline its employee, Steve Hockman, because he engaged in activities protected by Section 7 of the Act?

(3) Did Hockman have a right, under Section 7 of the Act and where Respondent's employees are unrepresented, to have an employee of his choice accompany him to an interview with his supervisor which he believed could lead to disciplinary action against him?

(4) Did Hockman ask Respondent for, and was he refused, such assistance from a co-employee, in violation of Section 8(a)(1)?

On the entire record in this case, including the briefs filed by the General Counsel and by Respondent and from my observation of the demeanor of the witnesses at the hearing, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent has plants in Orangeburg and Pearl River, New York, where it manufactures products for use by firms engaged in the electronics and telecommunications industries. The annual value of its products which were shipped directly from these plants to its customers located outside the State of New York exceeds $50,000. I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction over it.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The essential facts are not in material dispute.[2]

Respondent has about 350 unrepresented employees. In early 1978, the approximately 150 production and maintenance employees at its Orangeburg and Pearl River plants voted against representation.[3]

About 10 of these production and maintenance employees are employed in its precious metals department (PMD). Each day, the PMD employees are given small quantities of precious metals from a vault and at the end of the shift they turn in to a custodian the amounts in their possession then. The quantities given to them, and later received from them, are carefully determined and recorded by the custodian. On March 21, 1979, the supervisor of the PMD department, Steven Cross, held a meeting of these employees at which his supervisor, Don Bennett, informed them that production time was being lost each day as a result of the employees standing in line

[1] In its brief, Respondent asserts that the 8(a)(1) portion of the charge is "purely derivative" from the reference to Sec. 8(a)(3) therein. The language describing the basis of the charge does not allege discrimination based upon membership or lack thereof in any labor organization but describes only conduct which Sec. 8(a)(1) of the Act would proscribe. There is no matter before me involving Sec. 8(a)(3).

[2] Three individuals testified. One testified as to personnel records. The other two, Steve Hockman, the Charging Party, and his supervisor, Steven Cross, testified as to conversations they had between themselves. The discrepancies between their accounts are not of substance.

[3] In their briefs Respondent and the General Counsel referred to the Board's decision in *Materials Research Corporation*, 246 NLRB 398 (1979), where the particulars of the representation proceeding are set out.

at the vault to receive and later check in the quantities of precious metals. He noted that the employees were stopping work at 3:15 p.m., in order to get on line to check out and to leave by quitting time, 4 p.m. He announced a new schedule which staggered their hours so that they would report to work at 10-minute intervals and leave work on the same basis. Thus, one employee was scheduled to work from 7 a.m. to 4 p.m., the second from 7:10 a.m. to 4:10 p.m. and so on. Several of the PMD employees told Bennett at that meeting that the new schedule created problems for them. Bennett told them that he could work out their individual problems. The meeting ended. Several of these employees, instead of returning directly to their workplaces, talked among themselves and returning directly to their workplaces, talked among themselves and expressed annoyance at having their work hours changed so abruptly. Hockman was one of them. He suggested that they should go to see Respondent's personnel director, but nothing came of this.

The new work schedule went into effect on the following day, March 22. During that morning, Hockman talked with some of the PMD employees. Five of them decided they would go as a group to see Cross and Bennett about the new schedule. At or about lunchtime, three of these five, Hockman, Cathy Andriac, and Rich Gibson, went to Cross' office. There, Hockman told Cross that the employees were dissatisfied with the new work schedule and with the way it had been imposed on them. He said that, as it was a group problem, they wanted to discuss it with management at another group meeting. Cross responded that there is no group problem, that there are only individual problems and that anyone having individual problems can talk to him about it. He refused Hockman's request for a group meeting.

Hockman, Andriac, and Gibson left and went to see Don Bennett, the PMD manager. Bennett also refused their request for a group meeting. At one point in the discussion, he interrupted Hockman to tell him that the PMD was not a democracy, that he ran it, and that he would deal only with individuals. Hockman testified that Bennett's attitude appeared "fairly hostile" to him.

Later that afternoon, Hockman observed, through glass partitions, that Cross was talking individually with a number of the PMD employees in his office. One of these employees was Cathy Andriac. Cross testified that he asked her if she had any problems with the new schedule and she told him she had none. Cross then asked her how she got involved with the group meeting. She stated that Steve Hockman told her that other PMD employees had problems. Another PMD employee, Gibson, told Hockman shortly after he was interviewed that Cross and he had talked about the attempt to organize the group meeting. Cross then approached Hockman and told him that he would like to speak to him in his office. Hockman testified that he feared then that Cross intended to discipline him and that he based this fear on what had just occurred and on what he had heard about Respondent's attitude in dealing with employees who had engaged in a past union campaign. Apparently this referred to the matters discussed in the Decision referred to above in footnote 3. Hockman asked Cross if he intended to hold a disciplinary hearing in his office. Cross refused to answer him. Hockman told Cross that Federal law entitled him to have another worker present at a disciplinary hearing or at an investigative hearing from which discipline could reasonably result. Cross said he had no such right in Respondent's plant. After some argument on that point, Cross said that he wanted to talk to Hockman about the new work schedule and any problems he might have with it. Cross told him that, if he would like to come back to the office to talk, he (Cross) would be there. Cross began walking back to his office and Hockman followed him there. They talked about Hockman's schedule problem. Then, Cross asked Hockman why he organized the group meeting. Hockman responded that all the employees organized the meeting. Cross said that the other employees told him that he, Hockman, had "confronted" them and asked them to participate in the meeting. Cross told Hockman that he had no right to organize a meeting. Hockman replied that he had that right. They argued this briefly. Hockman asked if there was anything else Cross wanted and, when Cross said there was not, the meeting ended.

Late that same afternoon, Cross told Hockman that he wanted to talk to him in his office. Hockman went there and Cross told him that "this is a disciplinary hearing." Hockman got up to leave, saying that he did not have to be there for an investigative or disciplinary hearing "without proper representation" and that he was going to get another employee to come in with him. Cross told him that he was not permitted to do this and ordered him to sit down. Hockman complied. Cross then told him that he was being given a "verbal warning for failure to follow the company grievance procedure and for organizing that group meeting." Hockman made the same arguments that he made in their earlier discussion and Cross insisted that he had no such right to have another employee present. Cross also stated that Hockman had used production time to organize the meeting. A typewritten memo of the verbal warning was placed in Hockman's file. No other PMD employee received any discipline as a result of the incidents described above. The memo noted that Hockman had been given the warning for violating the following rules:

> Failure to follow the grievance procedure when he had a problem; and talking to other employees in their work areas during work hours, disrupting their work and trying to organize a meeting of the PMD employees for 12:30 p.m. without any authorization or permission of the Supervisor.

The memo contains longhand notations to "Pg. 26—Appeal Procedure (Employees Handbook)" and to "Pg. 35, Collections and Solicitations Pg. #1 and #4." Other writing on the memo states that "We understand that this section is intended for monetary collection. We feel the same applies here that it was disruptive to the employees while the employees were trying to work." Apparently, the personnel sections involved refer to some directive that employees must obtain supervisory approval before solicitations during working hours can be made.

A copy of Respondent's employee handbook was received in evidence solely to have the record in this case reflect the appeal procedure section therein. The provisions of the section describe a five-step process beginning with a discussion of any problem with "your immediate supervisor" and ending with an appeal to Respondent's president, whose decision "will be final and binding." There is nothing in the handbook barring group appeals.

Cross stated that on March 22 or 23, 1979, he told several PMD employees that Hockman had received a warning for the method he used to organize the meeting. Cross also testified that he tries to promote a relaxed atmosphere in the PMD department because the employees there work at close quarters and that, while there are many times that idle conversations take place there, he tries to keep these to no more than a minute each. There is no evidence that he tried to cut short any of the discusssions the PMD employees had on March 21 or 22 about the new work schedule.

B. *Analysis*

1. Alleged unlawful interrogation

The complaint, as amended at the hearing, alleges that Respondent, through Cross, violated Section 8(a)(1) by (a) interrogating employees regarding the identity of the individual responsible for seeking the group meeting on March 22, (b) interrogating Andriac as to how she got involved in the attempt to set up the meeting, and (c) interrogating Hockman as to his part in that attempt. Respondent asserts that there is no evidence that Cross specifically asked any employee to identify the individual who was responsible for the meeting and that his questionings of Audriac and Hockman were, at best, *de minimis* violations which should be dismissed as "technical contraventions of the statute." I find no merit to this view. The interrogations led up to the immediate discipline of Hockman, and Cross made it a point on March 22 and 23 to inform PMD employees that Hockman was so disciplined. The interrogation was not isolated but was an integral part of the events of March 22 and 23.

Respondent further asserts that it was privileged to conduct such questioning of Andriac and Hockman and later to discipline Hockman, as discussed below. It argues that the efforts of the employees to have a group meeting with Bennett was not an activity protected by Section 7 of the Act because Respondent, in its employee handbook, has set out an appeals procedure for resolving any grievance and the efforts of Hockman, Andriac, Gibson were designed to circumvent that procedure. I reject this contention by Respondent. Its internal appeals procedure may supplement, but not supplant, the rights of employees under Section 7 of the Act.[4]

While an employer may have a right to ask preliminary questions to determine whether or not employees are engaged in a concerted protected activity, it is unlawful for it to inquire into the specifics of that activity for such interrogation is plainly coercive.[5] I find that Respondent's questioning of Andriac and Hockman violated Section 8(a)(1).

2. The warning issued to Hockman

Respondent contends that the warning it issued to Hockman was lawful on the ground that Hockman had avoided the use of the appeals procedure established in its employee handbook. This argument does not have either a legal or factual basis to support it. Respondent would read *N.L.R.B.* v. *Washington Aluminum Company*, discussed above in footnote 4, as requiring Hockman to follow that "established procedure." The Court's opinion discussed the rights of unrepresented employees to engage in a work stoppage and held that right is protected, while noting that work stoppages in breach of a contract may not be. In that context, it discussed the rights of the unrepresented employees compared to those who are represented and who have an established procedure for resolving grievances. It is now well established that unrepresented employees are not required to use a procedure, unilaterally established by an employer, in lieu of the rights under Section 7.[6] Respecting the factual bases upon which the warning is predicated, there is no evidence that Hockman sought to avoid the procedures set up by Respondent although he concedes he never consciously sought to comply with them. He, Andriac, and Gibson had complied with the first two steps when the warning issued.[7] Neither Cross nor Bennett ever told Hockman, before the warning issued, that he was avoiding the "established procedures." Nor did Cross instruct Hockman or the other employees, when they discussed on the work floor the advisability of their taking action as a group, that they should get to work or to stop disrupting work. For that matter, Respondent offered no evidence that the discussions among the PMD employees on March 22 had a greater impact on production than any of their normal "idle conversations" had. It is also clear that Hockman alone was disciplined and not Andriac or Gibson.

The facts indisputably show that Hockman received the warning to discourage him and other employees from engaging in concerted activities protected by Sec-

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[4] Respondent construes the opinion in *N.L.R.B.* v. *Washington Aluminum Company*, 370 U.S. 9 (1962), as authority to support its view. There, unrepresented employees walked out to protest the company's failure to supply adequate heat in the shop. The Court rejected that employer's contention that the employees were lawfully discharged for cause because they violated a work rule by leaving their jobs without permission. It also rejected the court of appeals' view that the workers were discharged for cause for leaving work summarily without presenting a specific demand for relief to their employer. In effect, then, the employer there argued that its employees had no Sec. 7 rights to engage in self-help because they had not come to it to seek relief. It appears that everyone in that case assumed that employees have the right to appeal concertedly to their employer for an improvement in their working conditions. The issue there was whether their waiver of that right deprived them of their right to engage in a strike. There is nothing in the Supreme Court's decision to indicate that employees have no right to seek a meeting with their employer to redress a grievance. The case law is clear that Sec. 7 encompasses such a right. See *AMP, Incorporated*, 218 NLRB 33 (1975), and cases cited therein. See also *Empire Steel Manufacturing Company, Inc.*, 234 NLRB 530 (1978), and cases cited therein.

[5] *Medical and Surgical Clinic, S.C.*, 241 NLRB 1160 (1979); *Northern Telecom, Inc.*, 233 NLRB 1374 (1977).

[6] *Medical and Surgical Clinic, S.C., supra.*

[7] The appeals procedure contemplates that most complaints will be resolved within 3 weeks.

tion 7 and that no valid basis exists to forego remedying this action.

3. The *Weingarten* issue

The General Counsel contends that Respondent violated Section 8(a)(1) by conducting investigatory interviews with Hockman on March 22 after having refused his requests to have a coworker present to assist him. Respondent asserts that Hockman never requested that a coworker represent him and that he did not reasonably believe that the interviews were to be conducted with a view towards discipline. I find no merit in the contentions of Respondent. Hockman clearly indicated, prior to the first interview, his view that he was entitled to assistance by a coworker and Cross told him that Respondent would not permit this. It was obviously futile for Hockman to renew his request during the first interview. At the second interview Cross expressly refused Hockman's request. The requests need not be made in a formal manner. All that is required is that Respondent be put on notice of Hockman's desire for representation.[8] Section 7 rights, if they exist, are not to be construed in a "niggardly fashion."[9] Respondent suggests that the second interview involved only notice of the imposition of discipline and was not investigatory in nature. Were this so, Respondent need not permit a representative to be present.[10] The record, however, discloses that the second interview led to the broader basis for the discipline meted out to Hockman than was contemplated at its outset. Hockman was told he was being issued a warning for his activities in promoting group action. After further discussion and after he was expressly refused representation, Hockman was told that his conduct also had interfered with production and a reference to that point was expressly made in the memo placed in his file. In any event, the second interview was, in my view, a resumption of the first.

I also find no merit in Respondent's assertion that Hockman had no reasonable fear of being disciplined. The evidence is to the contrary. Cross had refused, prior to the first interview, to answer Hockman when he asked if Cross intended to discipline him. Bennett later told him that PMD is not a democracy and, in a hostile manner, told Hockman that group action is prohibited. Further, Hockman, prior to making his initial request for representation, had observed employees being interviewed individually by Cross and one of them told him that Cross discussed the group activities of the PMD employees. I thus find that Hockman reasonably feared being disciplined.

Respondent further contends that *Weingarten* rights should not be extended to its employees as they had rejected representation, notwithstanding the broad dicta in recent Board cases. I find merit to this contention. At the outset, it should be noted that no one is contending that Hockman was disciplined for requesting representation.[11] The General Counsel asserts that the case law is clear that unrepresented employees enjoy the same *Weingarten* rights as represented employees as to investigatory interviews and that an employer's only recourse, if it desires to deny the request, is to forego the interview. This argument has considerable appeal and I am strongly tempted to accept it as binding on me as it is well settled that I am required to follow the holdings of the Board unless and until they are reversed by the Supreme Court. The fact is, as Respondent's brief points out, that the language relied upon by the General Counsel in the cases is dicta. In these circumstances, considerable weight must be given to Board's language but it is also incumbent on me, and ultimately on the Board, to articulate the rationale upon which *Weingarten* rights either are or are not to be extended to unrepresented employees.[12]

To discuss the General Counsel's contention fairly, I must assume that he is urging that *Weingarten* applies in a situation where there exists a unit of unrepresented employees, that there is no issue of animus as to the exercise of Section 7 rights, and that the subject matter of the interview is not protected by the Act. To state the issue in concrete terms—does an employer violate Section 8(a)(1) where it conducts an interview with an employee in an unrepresented unit concerning, for example, his work deficiencies, assuming discipline is contemplated, and assuming also that the employee's request that a coworker be present has been denied?

In *N.L.R.B.* v. *J. Weingarten, Inc.*,[13] the Supreme Court held that the employer there violated Section 8(a)(1) by denying an employee's request that a union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. The majority opinion addressed itself to the question presented therein, whether Section 7 guarantees an employee's right to the presence of a union representative at the interview. It held that the Board's construction of Section 7 in that case plainly effectuates the most fundamental purposes of the Act which was designed to eliminate the inequality of bargaining power between employees and employers. In that regard, the Court noted that the presence of a knowledgeable union representative may save valuable production time and avoid unnecessary discipline and concomitant grievances. Lastly, it observed that the Board's construction of Section 7 in that case was in full harmony with actual industrial practices.

In *Glomac Plastics, Inc.*,[14] the Board held that the employer there violated Section 8(a)(1) by refusing an employee's request to permit a coworker, who was a member of the negotiating committee of the union which represented her, to accompany her to an investigatory interview. The union there had been certified; the employer had engaged in bad-faith bargaining and separately violated Section 8(a)(5). The Board, in *Glomac*, observed that the Supreme Court, in *Weingarten* and related cases, recognized that the participation of a union representative safeguarded the interests of all unit members.

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[8] *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977).
[9] *N.L.R.B.* v. *Washington Aluminum, supra.*
[10] *Baton Rouge Water Works Company*, 246 NLRB 995 (1979).
[11] Such discipline would not involve a *Weingarten*-type violation. See *Columbia University*, 236 NLRB 793 (1978).
[12] Cf. *N.L.R.B.* v. *Columbia University*, 541 F.2d 922 (2d Cir. 1976).
[13] 420 U.S. 251 (1975).
[14] 234 NLRB 1309 (1978), enforcement modified on other grounds 592 F.2d 94 (2d Cir. 1979).

The Board in *Glomac* did not expressly consider the premises upon which the Supreme Court in *Weingarten* upheld the Board's construction of Section 7. By clear inference, it considered one of them. The Board observed that Glomac's refusal to seek to reach agreement with the union there foreclosed its employees from the benefits of bargaining and that it would be improper to reward Glomac for its unlawful conduct. Obviously, this consideration reflected the Supreme Court's premise that Section 7 was aimed at eliminating bargaining inequities. That same consideration also had to take into account the Supreme Court's view that the presence of a knowledgeable union representative promotes harmony in the area of industrial relations and is consistent with actual industrial practice.

In *Glomac*, the Board also observed that unrepresented employees have the right to act in concert under Section 7 and that that right is in no way dependent on union representation for its implementation. The General Counsel urges that this language in the *Glomac* decision and the further statement therein that employees are entitled to protection against unjust employer practices whether or not they are represented by a union require that I now find that Hockman was unlawfully denied the assistance of a co-employee. I hesitate before attempting such a broad leap. To do so would require me to ignore the Supreme Court's rationale in *Weingarten* that it is consistant with actual industrial practices to require an employer to permit assistance by a knowledgeable union representative to an employee at an investigatory interview and that the representative thus can protect the rights of all other unit employees. There is nothing in the record in the instant case to indicate that the majority of Respondent's production and maintenance employees desired to have a worker appointed by Hockman protect their interests. To the contrary, they had voted to remain unrepresented. There is no basis to find that it is actual industrial practice for an employer whose employees are unrepresented to conduct an investigatory interview with an employee in the presence of another selected by that employee. Common experience discloses that the opposite is true. The General Counsel asserts that employers must treat union and nonunion employees equally as to rights they possess in common. I have no quarrel with that. To go further and to urge that union and nonunion employees thus have equal rights of representation is illogical. On that premise, it can also be urged that employees in an unrepresented unit should get the same wages for doing the same work as employees in a unit represented by a union. That may be, if the facts so warrant, and it may not be, again depending on the circumstances.

In determining whether unrepresented employees have a right to representation by a coworker, it is better to begin not with Section 7 but with the other end of the spectrum—the common law. At common law, an employee had few if any rights. Legislation since has created many employee rights. Section 7 of the Act sets forth certain of those rights. One of the reasons for its adoption was expressly considered in developing that rationale for the *Weingarten* holding. The Supreme Court in *Weingarten* quoted the language of the Act respecting the inequities of the bargaining power existing between employers and employees acting individually and recognized that the Board has the responsibility under the Act to consider the nature of a problem, as revealed by unfolding variant situations to develop a rational response, not a quick, definitive formula, as a comprehensive answer. Let us look at these factors relied on by the Supreme Court and discussed above as the basis for the *Weingarten* right and see how they pertain to an unrepresented employee, such as Hockman.

What useful function would a coworker have served at Hockman's interview? He could not represent the interests of other unit employees. To permit him to do so would go directly contrary to their expressed desire not to be represented. He would not be an experienced representative who may save production time. Indeed, his own time on the floor would be lost. He could not help Hockman protect any rights in an established grievance machinery as Hockman had no such rights but had to rely on Respondent's largesse in implementing its unilaterally established procedures. All these considerations indicate why it is not actual industry practice for a coworker in an unrepresented plant to accompany an employee to an investigatory interview.

The dicta in the Board cases on which the General Counsel relies are not based upon any articulation of those factors. None is set out in *Glomac, supra*.

In *Anchortank, Inc.*, 239 NLRB 430 (1978), an employee was brought to an investigatory interview between the time the union in that case had won an election and the time it was certified. The employee sought but was denied the assistance of a union representative. The employer there argued that it had no duty to deal with a union representative until certification issued. The Board, citing *Glomac, supra*, rejected that argument and held that, where the request was denied prior to the union's formal certification, the status of a requested representative, whether it be that of a union not yet certified or of a fellow employee, does not operate to deprive the employees of the rights they enjoy by virtue of the plain mandate in Section 7. The broad language in *Glomac*, in *Anchortank*, and, for that matter, even in the Second Circuit's opinion in *N.L.R.B.* v. *Columbia University, supra*, to that effect virtually compels me to find that Respondent either had to honor Hockman's requests or forego the interviews. Yet, the relevant tests, set out in *Weingarten*, do not support such a construction. Further, there seems to be a very practical reason why a *Weingarten* right should not apply in an unrepresented plant, aside from the ones discussed above. In the absence of a bipartite grievance procedure or the prospect that one will come about via good-faith bargaining,[15] investigatory interviews are usually informal in nature and take place in the actual work areas. On any given day a foreman repeatedly has occasion to make inquiries of employees as to their work and to give instructions to them. Frequently, these occasions lead to summary discipline. It would be unwise to hold that, on each such occasion, an employee can insist upon the presence of a coworker then.

[15] Cf. *Glomac Plastics, supra*, and *Anchortank, supra.*

In a represented unit, on the other hand, a foreman normally is guided by the grievance-arbitration procedures in the collective-bargaining agreement. The established practice is that union-attended interviews take place and these are arranged so that production is not disrupted. More significantly, the employee who may be disciplined has the contractual grievance procedure available to redress any wrong, as he perceives it. In an unrepresented shop, no such remedial steps are available. No useful function is fulfilled by requiring an employer, where its plant is unrepresented, to have two employees present in an investigation when, in the end, the employer is free to do whatever it chooses to do and is in no way answerable to a third party, i.e.—an arbitrator. Section 7 should not be construed to require an employer to participate in a charade. I find, on the rationale of the *Weingarten* decision, that it does not effectuate the purposes of the Act to require an employer to honor an employee's request that a coworker be present, in an unrepresented unit, during the course of an investigatory discussion that may reasonably lead to discipline. I base this conclusion not on the premise that such an employer would be required to bargain with the coworker, as case law is clear that no such obligation exists even in a represented plant. My conclusion rests on my evaluation of the factors considered controlling in *Weingarten.*

There remains for consideration whether Hockman was entitled to such assistance where he reasonably believed that the interview could lead to the warning which, as found above, violated Section 8(a)(1) of the Act. I do not think that a generic rule should be adopted on that account as it would conflict with the presumption that only lawful acts are intended. There is language in the *Weingarten* decision that the presence of a designated representative is advisable to protect a fearful or an inarticulate employee. Taken out of context, that language could be used to suggest that the presence of a third person may discourage the commission of an unfair labor practice. That would be a strained construction. The simple answer is that the peaceful prevention of unfair labor practices has been entrusted to the Board and its personnel.

I shall dismiss the allegation of the complaint that Respondent violated Section 8(a)(1) by conducting investigatory interviews with Hockman on March 22 after refusing his request that a coworker be permitted to accompany him.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by interrogating its PMD employees as to how and why they organized a group meeting to discuss changes in their work schedule, an activity protected by Section 7 of the Act.

2. Respondent violated Section 8(a)(1) by disciplining its employee Steve Hockman for his activities in organizing and participating in the group meeting.

3. Respondent did not violate Section 8(a)(1) by refusing Hockman's request to have a coworker present at investigatory interviews on March 22, 1979, as Hockman was employed in a unit which was unrepresented.

4. The unfair labor practices set out in paragraphs 1 and 2 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices proscribed by the Act, I recommend that it be required to cease and desist from such conduct and to take the affirmative action set out below.

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Materials Research Corporation, Orangeburg, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees as to how and why they participated in meetings among themselves for the purpose of discussing their work schedules and other terms and conditions of employment.

(b) Disciplining any of its employees because of their participation in such meetings.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Act:

(a) Post copies of the attached notice marked "Appendix"[17] at its plants in Orangeburg and Pearl River, New York. Copies of said notice, on forms provided by Regional Director for Region 2, after being duly signed by an officer of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Rescind the verbal warning given employee Steve Hockman and remove from his file the memorandum of the warning given him on March 22, 1979, and write him at his home address to confirm that the memorandum has been so removed and the verbal warning has been rescinded.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegation that Respondent violated Section 8(a)(1) by refusing to permit a coworker to accompany Steve Hockman to interviews on March 22, 1979, be dismissed.

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[16] In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings of fact, conclusions of law, and recommended Order herein shall, as provided for in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."